SUPREME COURT, U. S.

No. 73-617

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In the Supreme Court of the United States

OCTOBER TERM, 1973

SUCCESSION OF MRS. IRENE SCOTT CHOTIN (JOSEPH SCOTT CHOTIN, TESTAMENTARY EXECUTOR), PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Washington, D.C. 20530.

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This estate tax case presents the question whether certain gifts in trust, made by the decedent to her four grandchildren twenty-six months prior to her death, were made "in contemplation of death" within the meaning of Section 2035 of the Internal Revenue Code of 1954. Under Section 2035(b), the value of a gift made within three years prior to the donor's death is includable in the donor's gross estate as a gift in contemplation of death, unless it can be factually demonstrated that the gift was not so made. The statutory phrase "in contemplation of death" encompasses those transfers prompted by the thought of death and is not restricted to an apprehension that death is imminent or

near. Treasury Regulations (1954 Code), §20.2035-1(c). The Trial Commissioner and the full Court of Claims concluded that the gifts in question were made in contemplation of death (Pet. App. A 9-20; Pet. App. B 21-22).

1. The undisputed facts showed that decedent and her husband had a pattern of making inter-vivos gifts of bonds, most bearing a face value of $25, to their four grandchildren, as well as gifts of clothing and travel. On September 3, 1959, decedent and her husband jointly gave a total of $112,000 to trusts for the benefit of their grandchildren; the sum was used to purchase capital equipment to be rented to a family corporation, with income payable to beneficiaries in the discretion of the trustees, who have never paid any income to the grandchildren (Pet. App. A 13, 18, 19).

The gifts at issue were made by decedent in 1962 when she was 77 years of age. The property consisted of voting trust certificates for shares of stock in family corporations which maintained a policy of reinvesting all profits in the business. The property was transferred to spendthrift trusts which provided that income should be payable to the beneficiaries in the discretion of the trustees, who never exercised that discretionary power. Each trust was to terminate when the beneficiary reaches the age of 41 years or upon death[1] (Pet. App. A 15, 16). Three months after the decedent made the gifts in question, she executed a will leaving her property in trust to the same beneficiaries and on terms comparable to those in the gifts here in issue (Pet. App. A 13).

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[1] At the time of the gifts the beneficiaries ranged in age from 12 years to 20 years (Pet. App. A 16).

During her life, decedent traveled, entertained, swam, drove her automobile, did some of her own housework, and was generally active until the time of her unexpected death, which occurred while she was hospitalized for a gastrointestinal upset. However, during the seven years prior to her death, she had been diagnosed as having arteriosclerotic heart disease, a bleeding ulcer and heart fibrillation. In 1961 she was hospitalized for a subtotal gastrectomy, and during her hospitalization suffered two episodes of atrial fibrillation which were treated with digitalis. The following year she suffered three episodes of heart palpitation (Pet. App. A 17, 18). Decedent was in her 80th year when she died on February 10, 1965, as a result of "acute heart failure, due to long-standing arteriosclerotic and hypertensive heart disease" (*id.* at 17).

2. The question whether a gift is made in contemplation of death is one of fact, *United States* v. *Wells,* 283 U.S. 102; *Allen* v. *Trust Co.,* 326 U.S. 630. Where, as in this case, gift is made within three years of the decedent's death, the taxpayer has the burden of overcoming the statutory presumption that the gift was made in contemplation of death "by a preponderance of the evidence." *Landorf* v. *United States,* 408 F. 2d 461, 472 (Ct. Cl.). Here, there was ample evidence to support the decision below that the decedent's dominant or controlling motive was to make a testamentary-like disposition of some of her property. *United States* v. *Wells, supra,* 282 U.S. at 119; *Allen* v. *Trust Co., supra,* 326 U.S. at 636; *Bel* v. *United States,* 452 F. 2d 683 (C.A. 5), certiorari denied, 406 U.S. 919; *Cleveland Trust Co.* v. *United States,* 421 F. 2d 475 (C.A. 6), certiorari denied, 400 U.S. 819. At the time of the gift, she was 77 years old and had been suffering from heart disease for seven years. Significantly, shortly after the gifts were made, decedent made a will dis-

posing of her property on the same terms to the same beneficiaries. Thus, despite the evidence as to decedent's active life, "[o]ld age and bad health may conclusively establish that the primary motives were not life motives." *Landorf* v. *United States, supra,* p. 473. See also *United States* v. *Wells, supra,* 282 U.S. at 117.

Contrary to petitioner's argument (Pet. 5), the decision below does not conflict with *United States* v. *Wells, supra.* Petitioner apparently contends that because decedent led an active life with no thought of imminent death, the gifts cannot have been made in contemplation of death. But there is nothing in *Wells* which supports the proposition that a gift in contemplation of death cannot be made by a person leading an active spirited life. It is contemplation of death, not contemplation of imminent death, to which the statute refers. As this Court stated in *Wells, supra,* 282 U.S. at 118, in language particularly applicable to this case, "The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is 'near at hand.' " See also Treasury Regulations (1954 Code), §20.2035-1(c).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

ROBERT H. BORK,
Solicitor General.

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